Mr. Lee Thean Chu next referred to a recent decision of Thomson J. in Ipoh (*Public Prosecutor v. Woo Fong*[4]) which has not yet been reported in any law reports but has appeared in the press, in which he held that where an operation, such as a character lottery, is conducted by a single person or a group of persons in relation to a single specific sweepstake then the whole operation constitutes a single lottery. The remarks of the learned Judge as reported express so closely my own views on the subject that I had no hesitation in adopting them and in holding that in this case there should have been one charge and not two. I therefore quashed the conviction on the second charge, maintaining the conviction on the first charge.

I would not normally interfere with a sentence of this kind unless it was manifestly wrong, but having quashed the conviction on the second charge it became necessary to reconsider the sentence in respect of the first charge. I felt that the scale of the operations and the position and employment of the two appellants were such that the fine imposed by the learned Magistrate erred, if anything, on the side of severity. I therefore fixed the fine on the first charge at $1,000 in the case of each accused.

Order accordingly.

Re LEE THEAM NEOH, DECD.; OH PENG WAH v. LIM SAY LIEW (m.w.) & ORS.

[O.C.J. (Spenser Wilkinson J.) October 10, 1955]

[Penang — Originating Summons No. 41 of 1955]

Will — Appointment of executor — Whether executor is to take property on trust or beneficially — Civil Law Ordinance (Cap. 42), s. 10.

In her will, the testatrix provided as follows: "In the event of my death, I entrust the land and rubber plantation to Ong Giok Tuan and Lim Say Liew for administration for ever." The two persons named obtained probate of the will. The question that arose was whether the testatrix's property mentioned in the will went to the two named persons beneficially or as trustees for the persons entitled as upon intestacy.

Held: (1) by virtue of s. 10 of the Civil Law Ordinance, the executor of a will is deemed to be a trustee unless it appears by the will that the person so appointed executor was intended to take such residue beneficially; (2) in this case far from their being a contrary intention, the use of the word "entrust" indicated that the persons named were to take the property upon trust.

APPLICATION by way of Originating Summons.

Chen Choon Poon for the plaintiff.

G. H. Goh for the defendant.

Ong Peng Loon and *M. Abraham* for the others.

Spenser Wilkinson J. : — This was an application by way of Originating Summons for the construction of a will and consequential relief.

The will is a short one and it will be convenient to set it out in full. It reads as follows :—

"The maker of (this) document is Lee Theam Neoh. Now, Lee Theam Neoh, being old and ill, and fearing that she may die, has requested Teoh Hock Aun to be her attorney in respect of a piece of land at Batu Feringhi purchased for $500/- and a rubber plantation at Telok Bahang purchased for $10,000/- (I) now (execute) the power of attorney (kuasa) in favour of Teoh Hock Aun. In the event of my death, (I) entrust the land and the rubber plantation to Ong Giok Tuan and Lim Say Liew for administration for ever. This is mutual consent. For fear that words of mouth are not evidence, this document is made out and kept as proof."

The will is dated the 5th March, 1928 and the testatrix died on the 13th April, 1928. On the strength of the words "entrust the land the rubber plantation to Ong Giok Tuan and Lim Say Liew for administration for ever" these two persons applied for and obtained probate of the will as executrices. Ong Giok Tuan having died the defendant Lim Say Liew is the surviving executrix of the estate.

The question that arises upon this will is whether the testatrix's property mentioned in the will goes to the two named persons beneficially or as trustees for the persons entitled as upon an intestacy. On the one hand it was argued that the effect of the will was simply to appoint Ong Giok Tuan and Lim Say Liew as administratrices to administer the property in trust for the beneficiaries and on the other hand that there was an absolute gift to Ong Giok Tuan and Lim Say Liew, who were both wives of sons of the testatrix.

In the course of the argument I asked Counsel whether in their view the Executors Act, 1830 applied in the Colony and the view was expressed that it did not. I find, however, that the effect of this Act is reproduced in section 10 of the Civil Law Ordinance. Sub-section (1) of that section reads as follows :—

"10. — (1) When any person dies or has died, having by his will, appointed any person to be his executor, such executor shall be deemed to be a trustee for the person, if any, who would be entitled to the estate in case the person died intestate in respect of any residue not expressly disposed of, unless it appears by the will that the person so appointed executor was intended to take such residue beneficially."

The effect of this provision is set out in *Williams* on Executors, 13th edition page 885 as follows :—

"If the testator died between 1830 and 1926 the position was governed by the Executors Act, 1830. The effect of that Act was to shift the burden of proof. The executor had to prove, as against the next-of-kin, a distinct intention, to be found in the testamentary instrument, that he should take the residue beneficially. If the executors failed to prove this intention they held the residue in trust for the persons entitled under the Statutes of Distribution"

and again at page 889 :—

"The presumption against executors taking beneficially arising by virtue of the Executors Act, 1830 . . . . prevails unless a contrary intention appears by the will, so that where (this Act) applies, parol evidence is not admissible to show that the testator intended his executors to take the residue beneficially."

Mr. G. H. Goh on behalf of the defendant argued that the will being made in Chinese by a Chinese woman too much attention should not be paid to the technical meaning of the words and the effect of the first sentence of the will was really not to give a power of attorney to Teoh Hock Aun but to make him an administrator. He argued that the word "kuasa" is often used as referring to administrators as well as to attorneys. The first sentence of the will having thus, in effect, made Teoh Hock Aun administrator it followed that the subsequent words giving the property to the executrices "for administration for ever" meant administration only in the sense of "managing" and was intended to be an absolute gift.

Whilst I am prepared to agree that the words used by this testatrix should not be construed too technically I am unable to accept Mr. Goh's construction. In the first place it appears plain to me that the first sentence of this will is not testamentary in any sense. It appears to me to be a straightforward appointment of an attorney made by the testatrix before her death. The document really consists partly of a power of attorney and partly of a will. The only part of the document which is really testamentary is the second sentence commencing with the words "in the event of my death".

There is undoubtedly some difficulty in construing the words "for ever", but I think this does no more than indicate an intention of permanency. The word "entrust", however, appears to me to be an express word of trust. As pointed out by Mr. Lim Huck Aik it is just as easy in Chinese as in any other language to use the word "gift" and to my mind the word "entrust" quite definitely imports the notion that the property is entrusted for a purpose. I am of opinion that it was deliberately used as a word of trust.

Far, therefore, from their being a contrary intention in this will it appears to me to be plainly expressed that these ladies were to take the property upon trust. Whether that trust is one which fails for want of precision or whether it is a trust to administer appears to me to make no difference to the result.

I am, therefore, of the opinion that the property of the testatrix in question vested in the executrices in trust for the persons beneficially entitled as on an intestacy.

Order accordingly.

KR. NARAYANAN v. V. AL. ALAGAPPA

[A.C.J. (Storr J.) October 22, 1955]

[Muar — Civil Appeal No. 2 of 1955]

Moneylenders Ordinance, 1951, ss. 16 & 27 — Attesting of promissory note — When necessary.

This was an appeal against the decision of the learned Magistrate, Segamat, giving judgment to the respondent in the sum of $1,000 and costs. The appeal was on two grounds (1) that as the respondent was a moneylender, he had not complied with s. 27 of the Moneylenders Ordinance, 1951, in that as the appellant did not understand or write English, there was no attestation as required in the promissory note; and (2) that the respondent did not comply with s. 16 of the Moneylenders Ordinance as the promissory note did not contain all the terms of the contract.

Held: (1) s. 27 of the Moneylenders Ordinance merely provides that the terms of the promissory note are to be explained to the borrower if he does not understand the written language on such promissory note, and if the borrower understands the terms and contents of the note, it is unnecessary to have an attestor, even if the borrower does not understand the language in which the note is written that is either English or Malay; (2) on the facts the promissory note in this case as filled in by the appellant before execution was sufficient to satisfy the provisions of s. 16 of the Ordinance.

CIVIL APPEAL.

S. C. MacIntyre for the appellant.

Jeff Lang for the respondent.

Storr J. : — This was an appeal from the decision of the learned Magistrate, Segamat, giving judgment to the respondent (plaintiff) in the sum of $1,000 and costs.

The appeal was on two grounds —

1. That as the Respondent was a moneylender, he had not complied with section 27 of the Moneylenders Ordinance No. 42 of 1951 in that as the Appellant (Defendant) did not understand or write English, there was no attestation as required in the promissory note; and 2. That the Respondent did not comply with section 16 of the Moneylenders Ordinance as the promissory note did not contain all the terms of the contract.

Section 27 of the Ordinance reads as follows :—

"27. (1) Whenever a promissory note is taken as security for any loan and the borrower is a person not understanding the written language on such note the note shall be attested by an Advocate and Solicitor of the Supreme Court, a President of Sessions Court, a Magistrate, District Officer, Justice of the Peace, Registrar of a Sessions Court, Commissioner for Oaths, or such other person as may be appointed by the High Commissioner generally for such purpose. The attestor shall explain the terms of the promissory note to the borrower, and shall certify thereon that the borrower appeared to understand the meaning of the same. The money borrowed shall be paid over by the lender to the borrower in the presence of the attestor who shall certify the fact upon the promissory note. (2) Any promissory note required to be attested under this section and not so attested shall be void and the lender shall not be entitled to recover any loan for which such note is taken as security".

Mr. MacIntyre who appeared for the appellant argued very forcibly that this section meant that if the borrower did not understand the language in which the note was written, then it had to be attested; it did not